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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD L. WHITE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a defendant in a criminal matter waive the right to assert a violation of his Fifth Amendment right against self-incrimination when that issue, fully briefed and argued before the District Court, is raised in a footnote in defendant's brief to the Court of Appeals?

2. Is a defendant's right to due process protected adequately by an *in camera* hearing, from which he is excluded, into possible violations of the defendant's Fifth Amendment rights?

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The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion for the United States Court of Appeals for the Seventh Circuit entered in the proceeding which remanded Petitioner's case to the District Court for an *in camera* hearing. The Court of Appeals denied a timely petition for rehearing. *See* Appendix, p. 19.

OPINION BELOW

The opinion of the Court of Appeals is reported at 879 F.2d 1509 (7th Cir. 1989) and is reproduced at App. 1. The written ruling by the District Court as to Petitioner's motion to dismiss or, in the alternative, to suppress evidence appears at App. 20.

JURISDICTION

On July 18, 1989, the Court of Appeals remanded Petitioner's case to the District Court for a hearing. A timely petition for rehearing was denied on October 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Procedural Background

The Petitioner, Richard L. White, and his wife, Judith E. White, were indicted in the United States District Court for the Southern District of Indiana on two counts of bankruptcy fraud relating to a Chapter 7 personal bankruptcy. Following a jury trial, each was found guilty on both counts. On appeal to the United States Court of Appeals for the Seventh Circuit, Judith E. White's conviction was reversed because the evidence introduced at trial was insufficient to support her conviction. Petitioner's case was remanded to the District Court for an *in camera* hearing to determine whether his Fifth Amendment rights to due process had been violated by the prosecution's use of evidence transmitted to the government in violation of the attorney-client privilege by Petitioner's former attorney.

Factual Background

Petitioner had for several decades operated a corporation. When that corporation was driven into Chapter 11 bankruptcy during the early 1980's, Petitioner and his spouse were also forced into Chapter 7 personal bankruptcy because they had signed personal guaranties for the corporation's debts. Petitioner was represented in both bankruptcy proceedings by the Indianapolis law firm of Bamberger & Feibleman, and particularly by one partner in that firm, Mark Center. The Petitioner held several meetings with Center during the two bankruptcy proceedings.

After the Petitioner and his spouse had been released from bankruptcy, Center was indicted and convicted of bankruptcy fraud on a matter unrelated to Petitioner's bankruptcy. Following his conviction, but before his sentencing, Center began cooperating with the United States Attorney's investigation of Petitioner. As part of this cooperation, Center, who had been discharged from Bamberger & Feibleman as a result of his conviction, returned to the firm's offices, where he was allowed to review unattended the Petitioner's file. Center copied some documents from the file and turned over these stolen documents to the government.

Center also testified before the Grand Jury that indicted the Petitioner and his wife. Nancy Dison, formerly a paralegal at Bamberger & Feibleman, also testified before the grand jury and was shown a document from the Petitioner's file.

Before trial, counsel for the Petitioner moved to dismiss the indictment or, in the alternative to suppress evidence obtained as a result of Center's misconduct and the government's complicity in it. The motion was denied apparently on the strength of the government's assurances that it did not rely upon any improperly obtained evidence in securing an indictment or trying the Petitioner. Just before trial, counsel again moved orally to dismiss or, in the alternative, to convene an evidentiary hearing to determine the nature and extent of the evidence the government was able to obtain as a result of Center's cooperation. This motion was likewise denied. Thus, no hearing of any kind was ever conducted concerning the factual basis of Petitioner's Fifth Amendment claim.

Center was not called as a witness by the government during Petitioner's trial, nor were any of the documents he gave to the government submitted as evidence.

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED BECAUSE PETITIONER DID NOT WAIVE HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION WHEN HE FULLY BRIEFED AND ARGUED THE ISSUE BEFORE THE DISTRICT COURT AND RAISED THE ISSUE IN A FOOTNOTE IN HIS BRIEF TO THE COURT OF APPEALS.

A central issue raised by Petitioner was the role played by Mark Center in creating the government's case. After being convicted of an unrelated bankruptcy fraud and terminated from his law firm, Center volunteered information to the United States Attorney about the Petitioner's claim of personal bankruptcy. Ultimately, to provide the government with concrete information, Center stole documents from Petitioner's legal file at Bamberger & Feibleman and turned them over to the government. In addition, Center testified before the Grand Jury which eventually indicted the Petitioner. The Petitioner moved to review the documents stolen from his legal file, arguing *inter alia*, that Center's conduct violated Petitioner's Fifth Amendment right against self-incrimination. *See* App. at 39-41. It is likely that statements the Petitioner made to Center, either orally or memorialized in the stolen documents turned over to the government by Center, were used to develop the government's case against the Petitioner.

The Petitioner's concern that the government used the information provided by Center, giving rise to serious constitutional concerns that the government encouraged a breach of the attorney-client privilege and thereby violated Petitioner's Fifth Amendment right against self-incrimination was expressed in the Defendant's Appellate Brief and

in Defendant's Motion to Dismiss or, in the Alternative, to Suppress Evidence. *See* App. at 47; 39-41. However, the issue could not be fully elaborated in the brief because the District Court Judge declined to hold a hearing on the matter and did not permit defense counsel to review the documents.

The panel majority acknowledged the validity of the self-incrimination argument, *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989), but declined to consider the issue, holding that the Petitioner waived the issue because it was raised "by passing reference in a footnote . . ." *Id.* [The reference is to the Brief for Appellant, page 42, n.4, *see* App. at 51.] The majority's contention that Petitioner waived a constitutional right by arguing in a footnote is not supported by any relevant case law from the Seventh Circuit or sister Circuits and hence comes with unfair surprise to the Petitioner.

The majority cites two civil cases and three criminal cases to support its conclusion, all of which are inapplicable to the instant case. One civil case, *Pearce v. Sullivan*, 871 F.2d 61, 64 (7th Cir. 1989), involved a brief characterized as "execrable" because the entire brief was only six pages with few citations. *Id.* Petitioner could learn from *Pearce* only that an unprofessional brief offering unsupported arguments will give rise to criticism of the brief and a reprimand from the court, not a waiver of a constitutional right. The other civil case relied on by the majority, *Bonds v. Coca Cola Co.*, 806 F.2d 1324, 1328 (7th Cir. 1986), presented certain allegations generally. The court held legal issues must be properly developed by a sufficient factual basis and argument. *Id.* In asserting that the District Court erred in denying an evidentiary hearing, Petitioner related facts supporting an assertion that the government violated his Fifth Amendment

rights against self-incrimination and due process of law. Moreover, because Petitioner was not permitted to review the documents or Center's Grand Jury testimony, he could not develop in detail the factual basis of his assertion that his constitutional rights were violated. The court's reliance on the civil cases is particularly misplaced because they did not address constitutional rights. The cases do not stand for the proposition that a criminal defendant waives his constitutional rights by asserting them in a footnote.

To further support its position, the majority opinion cites three criminal cases: *United States v. Binder*, 794 F.2d 1195 (7th Cir.), *cert. denied sub nom*, *Celani v. United States*, 479 U.S. 869 (1986), *United States v. Williams*, 877 F.2d 516 (7th Cir.), *cert. denied*, 110 S. Ct. 180 (1989), and *United States v. Mealy*, 851 F.2d 890 (7th Cir. 1988). These cases are factually distinguishable from the case at bar. Most significantly, none involves a constitutional issue argued in the court below and referenced by a footnote in the Appellate Brief.

Binder and *Williams* involved "conclusory and unsupported allegations of error" which are in no way similar to the argument presented by the Petitioner. *White*, 879 F.2d at 516 (Will, J., concurring in part and dissenting in part). *Mealy* involved the complete waiver of an issue. The court noted that the Appellant could have made an argument but did not. Therefore, the court would not consider it. *Mealy*, 851 F.2d at 909. None of these cases supports the majority's contention that the Petitioner achieved a waiver of a constitutional right by referencing the affected right in a footnote in the midst of a main-text plea for an evidentiary hearing to establish the factual basis for his constitutional claim. The Petitioner in this case clearly identified both the nature and implications of the trial court's error in denying an evidentiary

hearing. Petitioner explained that the denial of an evidentiary hearing prejudiced him because the government's conduct may have amounted to constitutional violations.

The majority's holding that an issue involving the protection of constitutional rights is waived if raised in a footnote to an Appellant Brief is virtually unsupported by case law. Petitioner could not have known that one of his constitutional arguments would not be heard merely because he asserted it in a footnote. The footnote occurs in a portion of the brief that fully details the nature of Center's relationship with the government and his violation of the attorney-client relationship. *See* App. at 47-51. Moreover, the opinion disregards that the Petitioner raised the issue and argued it extensively before the District Court. *See White*, 879 F.2d at 1516 (Will, J., concurring in part and dissenting in part).

The Seventh Circuit's waiver determination conflicts with this Court's pronouncements concerning waiver of a fundamental constitutional right. It is axiomatic that a wavier of a constitutional right "not only must be voluntary but must be knowing, intelligent, done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970) (footnote omitted). The Petitioner could not have anticipated that the Seventh Circuit would consider a footnote reference to a fundamental constitutional right to be evidence of an issue's lack of importance to the Petitioner. Given this Court's fundamental holding that courts are to "indulge every reasonable presumption against waiver" and "not presume acquiescence in the loss of fundamental rights" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), it is incorrect and unfair to hold that the Petitioner voluntarily, knowingly, and intelligently waived his right against self-incrimination.

Finally, the majority opinion fails to recognize that Petitioner was unable to develop his Fifth Amendment argument any further because the district court refused his request for the opportunity to develop the facts. Despite timely requests for an evidentiary hearing, Petitioner cannot, to this day, articulate the full extent to which his right against self-incrimination was violated by Center's actions and his interaction with the United States Attorney. "His failure to provide any specific legal authority for this argument is explained, in part, by the fact that he focused on the need for a hearing to determine whether the privilege had ever been breached." *White*, 879 F.2d at 1516 (Will, J., concurring in part and dissenting in part). However, it is almost certain that Center did violate the Petitioner's privilege with the knowledge and acquiescence, if not active encouragement, of the United States Attorney "[g]iven the fact that the Government apparently had insufficient information on which to prosecute the rights before Center's cooperation." *Id.* at 1515.

All the known facts in this case point to a serious violation of the Petitioner's Fifth Amendment rights by Center and the government. Petitioner argued the issue as far as he could with the limited facts made available to him. The majority's ruling holds that the Petitioner needed to argue more facts—facts unknown to him because they were explicitly and deliberately withheld from him. Such a ruling is unjust and allows the government to benefit from its complicity in the violation of Petitioner's fundamental constitutional right against self-incrimination.

II.

THE WRIT SHOULD BE GRANTED BECAUSE ONLY A FULL EVIDENTIARY HEARING IN WHICH PETITIONER MAY PARTICIPATE, RATHER THAN THE *IN CAMERA* HEARING AUTHORIZED BY THE COURT OF APPEALS, CAN FULLY PROTECT PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

Center's conduct, in addition to constituting a potential violation of the Petitioner's right against self-incrimination, taints the government's entire case with the implication that the United States Attorney's Office violated the Petitioner's right to due process of law. With the government's knowledge—if not before the fact, certainly afterward—Center stole documents from the Petitioner's legal file at Bamberger & Feibleman. Those documents were then turned over to the United States Attorney for its use in creating and developing a case against the Petitioner and his spouse.

Petitioner never learned precisely what information Center revealed to the government, let alone the extent to which the government used this stolen information in securing an indictment. The District Court entered an order denying the Petitioner's Motion to Dismiss or, in the Alternative, to Suppress Evidence. *See* App. at 21. The panel for the Seventh Circuit Court of Appeals recognized the potential for a violation of due process where "[T]he government, having the kind of hold over an attorney that it had over Center . . . extracts from him clients' secrets that it then uses in a criminal trial of the clients to the latter's substantial prejudice. . . ." *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989).

Further, the panel recognized that, even accepting the government's claim that it did not introduce any privileged documents into evidence at trial, the Petitioner's

right to due process could be violated "[I]f the privileged documents or other privileged communications were used to obtain evidence that *was* placed in evidence." *Id.* The Court of Appeals, seeking the establishment of a "full record," remanded the Petitioner's case to the District Court for a hearing.

However, the panel majority, in remanding the case for a hearing, gave the District Court discretion to conduct an *in camera* examination of the stolen documents and of Center's testimony before the Grand Jury before determining whether an evidentiary hearing, in which the Petitioner and his counsel would participate, is necessary. This procedure is entirely inadequate. Petitioner's right to due process is hardly protected where a District Court judge, who has earlier ruled that the stolen documents were not privileged (a ruling made without reviewing the documents) and who relied upon the government's assurances that it did not introduce any privileged documents into evidence, is allowed to conduct an *in camera* examination to resolve the issue. Due process requires that the Petitioner know what documents were stolen from his file by Center and what Center revealed to the government in order to determine the extent to which the information was privileged and the degree to which privileged information helped the government establish its case against the Petitioner. Therefore, it is "only with a hearing in which defense counsel can participate and contribute to the resolution of whether or not his client's Fifth Amendment rights were violated can a 'full record' be made." *White*, 879 F.2d at 1518 (Will, J., concurring in part and dissenting in part).

It is ironic that the majority recognizes that the government's use of "clients' secrets" in a criminal trial can violate the rights of a criminal defendant, yet does not

recommend the fairest way of discovering whether such a violation has in fact occurred. In *United States v. Kleifgen*, 557 F.2d 1293 (9th Cir. 1977), a case cited by the panel majority, the court addressed the question of whether a criminal defendant had received a fair trial where the government had interviewed his former counsel. The record did not disclose what had transpired during that interview or the circumstances leading up to it. Therefore, the court remanded the case for an evidentiary hearing. *Id.* at 1297; *See also United States v. Fortna*, 796 F.2d 724 (5th Cir.) *cert. denied*, 479 U.S. 950 (1986). Judge Will, the third member of the panel that reviewed the Petitioner's case, recognized clearly that a full record will not be available to the court without evidence of the conversations between Center and the government prior to the Grand Jury indictment and without some investigation into the government's involvement in Center's act of stealing documents. *White*, 879 F.2d at 1517-18 (Will, J., concurring in part and dissenting in part).

The government's conduct in this matter raises serious constitutional concerns. Because an *in camera* examination is necessarily limited in terms of the scope of evidence that will be reviewed and because it precludes the Petitioner and his counsel from assisting in the determination of whether the Petitioner's Fifth Amendment rights were violated, the Seventh Circuit's laudable goal of procuring a "full record" can be achieved only through a full evidentiary hearing.

CONCLUSION

For each of the foregoing reasons, the Petitioner respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit to resolve the questions presented herein.

Respectfully submitted,

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December 12, 1989

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-1925 & 88-1926

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUDITH E. WHITE and RICHARD L. WHITE,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Indiana.
No. IP 87-123-CR—**Sarah Evans Barker,** *Judge.*

ARGUED NOVEMBER 9, 1988—DECIDED JULY 18, 1989

Before BAUER, *Chief Judge*, POSNER, *Circuit Judge*, and WILL, *Senior District Judge.**

POSNER, *Circuit Judge.* Richard White and his wife Judith were convicted of bankruptcy fraud in violation of 18 U.S.C. § 152. Mr. White was fined $25,000 and given a short prison sentence, which the judge suspended; both Whites were ordered to provide community service for several months.

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* Hon. Hubert L. Will of the Northern District of Illinois, sitting by designation.

Richard White ("White") was a principal of a corporation named White Petroleum, which owned gas stations in Indiana and Ohio. Mrs. White, a nurse, was not directly involved in her husband's business activities. In 1983 White Petroleum declared bankruptcy, pulling the Whites down with it because they had made personal guarantees of several million dollars to the corporation's creditors. White retained the Indianapolis law firm of Bamberger & Feibleman, which had represented the corporation in its bankruptcy proceeding, to represent him and his wife in their personal bankruptcies. A partner in Bamberger & Feibleman who worked on both the corporate and the personal bankruptcies, Mark Center, met with White in March 1984. At that meeting, according to White, a decision was made to list on the Whites' asset statement a $10,000 loan that White had made to Twin Flags Trucking Company as a capital contribution having no present value rather than as a receivable, and in addition Center opined that certain life insurance policies owned by White were exempt property. Mrs. White was not present at this or any other meetings at which bankruptcy was discussed.

The personal bankruptcy petition was filed in December 1984, and in May of the following year the Whites were discharged from bankruptcy because the trustee concluded that there were no assets available for unsecured creditors. Two years later Mark Center was convicted of bankruptcy fraud in an unrelated matter and shortly afterward the government solicited him to help it obtain information on still another matter. Unable to assist the government with that matter Center volunteered that he had information that fraud had been committed in the Whites' bankruptcy. The government was interested and Center agreed to assist. To that end (though apparently not at the government's direction), he went to the offices of Bamberger & Feibleman, with which he was no longer affiliated, and copied a number of documents from the Whites' file. These he gave, through his counsel, to the government. Center later testified before the grand jury

that was considering whether to indict the Whites, but he did not testify at their trial.

The charge against the Whites was that in their petition for bankruptcy they had willfully listed a phony third mortgage on their house and had willfully concealed several assets, including three life insurance policies, the $10,000 loan, and some stock in a local bank. The district judge denied the Whites' request to examine the documents that the government had obtained from Mark Center, after the government assured the judge that it had not sought to place any of those documents in evidence and in addition submitted an affidavit stating that it had not received any privileged documents from Center. The government did not show the judge any of the documents it *had* received from Center.

The Whites argue first of all that there is no proof they read the bankruptcy petition before signing it. It is of course true that many people sign documents—even solemn documents reciting that the signer signed with knowledge of the contents and under penalty of perjury (and the Whites' bankruptcy petition contained such a recital, right above their signatures)—without reading them. This is a fact of life for a jury to consider in determining how likely it is that a defendant who signed a document knew what was in it. The cases rather confusingly say on the one hand that "proof of a signature alone . . . is insufficient by itself to make knowledge of the contents . . . attributable to the signor," and on the other hand that "the signature . . . is *prima facie* evidence that the signor knows the contents." *United States v. Harper*, 458 F.2d 891, 894-95 (7th Cir. 1971); see also *United States v. Bass*, 425 F.2d 161 (7th Cir. 1970); *United States v. Tolkow*, 532 F.2d 853, 857 (2d Cir. 1976). This makes it sound as if a jury both may not infer knowledge from the signature alone and may. But the confusion is semantic rather than substantive. There always is more evidence than the signature—evidence at the very least of the nature and length of the document—and the issue should be whether the total circumstances, including but not limited to the bare fact

of the defendant's signature, warrant a confident inference that the defendant knew what he was signing, see, e.g., *United States v. Bessesen*, 445 F.2d 463, 471 (7th Cir. 1971), or, what has the same legal significance, deliberately refused to acquaint himself with the contents, fearing what he would discover if he did, see, e.g., *United States v. Josefik*, 753 F.2d 585, 589 (7th Cir. 1985).

In the case of Mr. White, the circumstances enable the necessary inference of knowledge or reckless indifference to be drawn. He met with bankruptcy counsel to prepare both the corporate and the personal bankruptcy petitions. He knew he would have to meet with his creditors, to be examined under oath regarding the truth of the petition. See 11 U.S.C. §§ 341, 343. He was an experienced businessman who handled all the financial affairs of his household. It was not a case of a single oversight. There was sufficient evidence to establish beyond a reasonable doubt that White was aware of the contents of the petition.

But there was insufficient evidence with regard to Mrs. White, and she must therefore be acquitted. There is no evidence that she was involved in her husband's business affairs, knew anything about them, or took any interest in them. One of the government's own witnesses testified that Mrs. White had signed documents (a mortgage and a personal guarantee) without, so far as this witness was aware, reading them. She attended none of the meetings at which her husband discussed the bankruptcy petition with the lawyers. It is true that one of the assets concealed was an insurance policy on her own life, but this suggests only that if she had read the petition she might have noticed an omission. It is true, too, that her signature appears not once but several times, on different documents attached to the petition—but not on the pages listing the petitioners' assets. There is no evidence beyond the inference that can be drawn from her signatures that she did read the petition and accompanying schedules. In the circumstances—having regard for the nature of the bankruptcy-petition form, the circumstances in which she had previously signed documents involving her husband's

business, and the nature of her own occupation—the inference cannot be drawn with the confidence required in a criminal case.

That leaves us with a number of other issues raised by Mr. White, but only two have sufficient merit to require discussion. The first is whether the indictment was "duplicitous" in combining a number of fraudulent omissions from the bankruptcy petition in a single count. The argument that it was is that the jury may not have been unanimous with regard to any specific omissions—it is possible, for example, that three jurors may have been utterly convinced about one of the omissions, two others about another, the other seven about a third. That is a danger, but on the other side is the danger that if every omission is a separate count, a single fraudulent scheme could give rise to a staggering number of separate convictions. The statutory offense is bankruptcy fraud, and the grand jury is not obliged in our view to place every piece of the fraud in a separate count. No more is the petit jury required to agree on every detail, provided they are unanimous in believing beyond a reasonable doubt that the defendant committed the fraud. Cf. *United States v. Markowski*, 772 F.2d 358, 364 (7th Cir. 1985); *United States v. Balistrieri*, 779 F.2d 1191, 1224 (7th Cir. 1985).

The few cases on point support our conclusion, treating the fraudulent nondisclosure of several items of property in the petition for bankruptcy as a "single continuous concealment" constituting a single offense. *Tugendhaft v. United States*, 263 Fed. 562, 563 (5th Cir. 1920); cf. *United States v. Berardi*, 675 F.2d 894, 898 (7th Cir. 1982). "Surely, if an accused should conceal a dining room set, a china set, or one thousand silver dollars belonging to the estate of the bankrupt, his offense of failure to reveal or disclose would not be multiplied by the number of separate items concealed." *Edward v. United States*, 265 F.2d 302, 306 (9th Cir. 1959). And would the dining room set be a single item, or the number of separate pieces of furniture in the set? "[T]he duty to disclose . . . is a single duty to reveal all." *United States v. Moss*, 562 F.2d 155, 160 (2d Cir.

1977). The fact that here a single form was involved supports this conclusion. Cf. *United States v. Hawkins*, 794 F.2d 589 (11th Cir. 1986). Although we can find no cases on the point, we have no doubt that plural fraudulent omissions in a single federal income tax return are one offense rather than as many offenses as there are omissions; and we know that tax evasion committed over several years can be charged as a single continuous course of evasion, see *United States v. Johnson*, 319 U.S. 503, 513-15 (1942); *United States v. Shorter*, 809 F.2d 54, 56-58 (D.C. Cir. 1987).

Moss draws what at first glance may seem an arbitrary distinction between nondisclosure in the initial petition and later. "When the concealment of assets belonging to the bankrupt occurs after a receiver or Trustee has been appointed, however, each separate act of concealment is a separate violation of the statute." *Id.* But as the court explains, "in each such instance there is a separate act, taken at a discrete time, accompanied by the requisite intent." *Id.*; see also *United States v. Melton*, 763 F.2d 401 (11th Cir. 1985) (per curiam). "Any other rule," the court in *Moss* continued, "would permit a defendant who has committed a first concealment to steal more on the theory that he would never become a sheep but always remain a lamb." 562 F.2d at 160. The same, though, is true of the pre-filing concealment; if the defendant plans to omit one asset, he won't incur additional criminal liability by omitting others. But there is a difference between the two cases. It is the distinction between an act of omission and an act of commission—a distinction perhaps too much derided. It is easier to determine whether someone hit X than whether someone failed to rescue X; and the difference is a clue to the law's differential treatment of inflicting harm and failing to rescue from harm. It likewise is easier to imagine every separate act of concealment as a separate crime than to imagine every piece of information omitted from a form as a separate crime. We need not explore the possible tension between *Moss* and the tax evasion cases cited earlier.

The second noteworthy issue raised by White is the government's refusal to allow his attorney to examine the documents that the government had obtained from Mark Center. Even if, as the government argues, none of the documents was introduced in evidence, some of them may, for all that appears, have provided leads to evidence that the government did use. The threshold question is, so what? If the government did obtain leads from the documents, did that violate any right of White's? White suggests three possibilities. The first is that if any of the leads resulted from statements made by White to Center and reported in the documents, such use of the statements may have violated his Fifth Amendment right against compulsory self-incrimination. However, by failing to raise this issue other than by a passing reference in a footnote, White has waived it. See, e.g., *Pearce v. Sullivan*, 871 F.2d 61, 64 (7th Cir. 1989); *Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1328 (7th Cir. 1986). Although the cases establishing this precept are civil cases, we have deemed it applicable to criminal cases as well. See *United States v. Williams*, Nos. 88-1389, 88-1390, slip op. at 4 (7th Cir. June 6, 1989); *United States v. Binder*, 794 F.2d 1195, 1203 (7th Cir. 1986); *United States v. Mealy*, 851 F.2d 890, 909 (7th Cir. 1988) (dictum). Second, White argues that the use of documents obtained from his (former) attorney infringed his Sixth Amendment right to counsel. This argument has no merit, because Center was not representing White in the criminal matter and because that matter had not yet proceeded from the investigative to the accusatorial stage. See *Moran v. Burbine*, 475 U.S. 412, 432 (1986). Third, White argues that the government may have violated the attorney-client privilege by making use (if it did make use) of information that he had given his attorney, Center, and that if so the government violated the due process clause of the Fifth Amendment as well. Surprisingly, the government does not argue that the privilege was unavailable to White because the disclosures he made to Center were fraudulent. See *United States v. Zolin*, 109 S. Ct. ____ (1989).

Given this waiver by the government, the third argument has *potential* merit, though no more. Although White could have prevented the admission of any testimony by Center that violated the attorney-client privilege—that is what an evidentiary privilege *means*—Center did not testify at White's trial, and it is far from clear that the proper remedy for a violation of the attorney's duty of confidentiality is exclusion from the client's criminal trial of probative evidence obtained as an indirect consequence of that violation. Exclusionary remedies are strong medicine, normally reserved for constitutional violations and challenged even there, and when the attorney is not the defendant's criminal defense attorney there is, as we have just seen, no Sixth Amendment issue. (And there is no constitutional right to counsel in civil cases on which to hang a *constitutional* attorney-client privilege.) If, however, the government, having the kind of hold over an attorney that it had over Center—for when it approached him he had been convicted but not yet sentenced—extracts from him client secrets that it then uses in a criminal trial of the client to the latter's substantial prejudice, this *might* be the kind of serious governmental misconduct that would violate a criminal defendant's rights under the due process clause of the Fifth Amendment. So at least a number of cases suggest. See *United States v. Kleifgen*, 557 F.2d 1293, 1297 (9th Cir. 1977); *United States ex rel. Shiflet v. Lane*, 815 F.2d 457, 465-66 (7th Cir. 1987); *United States v. Fortna*, 796 F.2d 724, 733 (5th Cir. 1986); *United States v. Rogers*, 751 F.2d 1074 (9th Cir. 1985). The fact that in this case no privileged documents were actually introduced in evidence (and this we have only on the government's say-so) need not be crucial on the theory of these cases, if privileged documents or other privileged communications were used to obtain evidence that *was* placed in evidence—a matter on which the government's affidavit is silent. All we know is that the government claims not to have introduced any privileged documents into evidence.

We do not want to decide a constitutional issue unless we have to, and we may not have to, since the government may have made no use of privileged documents in this case. We would also prefer to resolve the issue on a full record. To resolve the threshold factual questions the case must be remanded for appropriate proceedings in the district court to determine, first, whether the government procured or was otherwise complicit in a violation of the attorney-client privilege and, second, if so, whether the violation resulted in the introduction of evidence sufficiently material and adverse to White that the failure to exclude it denied him his basic procedural rights.

The district judge may if she wishes conduct an initial *in camera* examination of the documents that the government obtained from Mark Center and of the transcript of his grand jury testimony before deciding whether an evidentiary hearing (at which materials submitted to the grand jury could be disclosed to the defense pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i) and (ii)) is necessary to resolve the issue. If she decides there was no error of constitutional magnitude, the conviction of White will stand, subject of course to his right to appeal from her determination. If she decides there was constitutional error, the government will be able to appeal and challenge the proposition that a violation of the attorney-client privilege by the government can in an egregious case violate not the Sixth Amendment right to counsel, which as we have emphasized is not in issue here, but the Fifth Amendment right to due process.

To summarize, the judgment against Judith White is reversed with directions to acquit her, and the case against Richard White is remanded for further proceedings consistent with this opinion.

REVERSED IN PART, AND REMANDED IN PART.

WILL, *Senior District Judge*, concurring in part and dissenting in part. I concur in most of the court's opinion. Specifically, I agree that there was sufficient, though by no means overwhelming, evidence from which the jury could have concluded beyond a reasonable doubt that Mr. White knew the bankruptcy petition was incomplete and that his explanation as to the reasons for the omissions was not credible. It should be noted in this connection, however, that his explanation was largely that he relied on advice of his counsel, Mark Center, who was convicted of an unrelated bankruptcy fraud and was obviously capable of committing and counselling such fraud.

I also agree that as to Mrs. White although the jury found her guilty, there was insufficient evidence to sustain that verdict and it must be reversed. I agree as well that the indictment was not duplicitous in combining a number of allegedly fraudulent omissions in one count.

As to the question of the government's use of Center as the source of the information on the basis of which the Whites were indicted and convicted, I also agree that, since in the criminal proceedings he was not counsel for the Whites and because the case was still in the investigative stage, there was no violation of their Sixth Amendment right to counsel. The Whites were discharged and the bankruptcy proceedings concluded in May of 1985, Center was not convicted until March 1987 and apparently did not represent the Whites after their discharge.

Finally, I agree that the case against Richard White should be remanded for further proceedings. It is only with respect to his Fifth Amendment claims and particularly the steps to be taken by the trial judge to resolve them that I find myself in disagreement with the majority. As the majority opinion points out, after Center's conviction for bankruptcy fraud in an unrelated matter but before sentencing, the government solicited him to help obtain evidence on another matter. He apparently tried to assist the government and presumably himself by so doing but was unsuccessful. He then told the government,

which apparently had no prior knowledge of the matter, that he had information that fraud had been committed in the Whites' bankruptcy. With the government's knowledge (since it received the files), though apparently not at its direction, Center went to the offices of Bamberger and Feibleman and removed or copied a number of documents from the Whites' file and turned the documents or copies over to the government. Thereafter, Center apparently had additional meetings with government counsel in order to prepare for his testimony before the grand jury on September 24 and again on October 22, 1987. The record before us is devoid of any information as to (1) what Center said to government counsel in any of their meetings or even how many meetings were held, (2) what documents he stole from the Bamberger and Feibleman files and turned over to the government or (3) what he testified to before the grand jury. Given the fact that the government apparently had insufficient information on which to prosecute the Whites before Center's cooperation, it seems likely that he both breached the Whites' attorney-client privilege and incriminated them by the stolen information he turned over since it apparently enabled the government to indict and convict them.

When defense counsel raised the question of the government's conduct and its refusal to permit counsel even to examine the stolen documents and moved for an evidentiary hearing to determine whether the Whites' Fifth and Sixth Amendment rights had been violated, the government responded, not that at trial or before the grand jury it had introduced none of the documents obtained by Center's theft or any incriminating information obtained from him either in their conferences or from the documents, but only that at trial it had introduced no privileged documents. The trial judge denied the motion for a hearing "as a matter of law" on the ground that the Whites had pointed to no privileged documents which had been introduced in the trial.

That holding, as the majority impliedly concedes, does not comport with current case law. The test is not simply

whether privileged documents were introduced at trial but whether any privileged information, documentary or otherwise, was given to the government and used to secure the indictment or at trial. *See Weatherford v. Bursey*, 429 U.S. 545, 552 (1976); *United States v. Fortna*, 796 F.2d 724, 731 (5th Cir.), *cert. denied*, 479 U.S. 950 (1986); *United States v. Judson*, 322 F.2d 460, 466 (7th Cir. 1963) (when client's privileged information is in the possession of an attorney its production may not be compelled or used by the government).

As the majority opinion recognizes, there are two potential Fifth Amendment violations here. The first is that Center's disclosures to the government, either orally or through documents, of statements made by White to him may have violated White's Fifth Amendment rights against self-incrimination. This is obviously a serious possibility since, as previously pointed out, the government apparently had insufficient evidence incriminating the Whites before Center's disclosures and thereafter had sufficient evidence to indict and convict them.

The majority disposes of this potentially serious violation by finding that, since it was only specifically raised in a footnote, "White has waived it." *Ante* at 7. It should first be noted that White's counsel asserted that the government's conduct violated White's Fifth and Sixth Amendment rights. He emphasized that, in violating the attorney-client privilege by securing information from Center and using it to indict and convict White, the government had violated the due process clause of the Fifth Amendment, the second potential violation here involved. I cannot agree that we can or should under the waiver doctrine dispense with White's argument based on his Fifth Amendment right against self-incrimination.

First, I find that the cases cited by the majority are factually distinguishable from the one before us. The majority cites three criminal cases in support of its waiver argument. In *United States v. Williams*, Nos. 88-1389, 88-1390, slip op. at 4 (7th Cir. June 6, 1989), and *United*

States v. Binder, 794 F.2d 1195, 1203 (7th Cir. 1986), the defendants had made only conclusory and unsupported allegations of error apparently inviting the reviewing courts to search the records and provide legal arguments to show error. In *United States v. Mealy*, 851 F.2d 890, 909 (7th Cir. 1988), the court noted a potential argument to show ineffectiveness of counsel which the defendant had not raised at all and had, therefore, waived. In contrast, in the present case, White identified a potential Fifth Amendment right against self-incrimination violation based on the breach of the attorney-client privilege. His failure to provide any specific legal authority for this argument is explained, in part, by the fact that he focused on the need for a hearing to determine whether the privilege had even been breached. *See* Brief of Defendant-Appellant at 40-42. In addition, White had argued in his Motion to Dismiss the Indictment or, in the Alternative, to Suppress Evidence that his right against self-incrimination had been violated. In the context of a trial, waiver of a constitutional privilege or right requires evidence of a knowing and intentional decision to waive. *See United States ex rel. Williams v. DeRobertis*, 715 F.2d 1174, 1178 (7th Cir. 1983) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)), *cert. denied, Williams v. DeRobertis*, 464 U.S. 1072 (1984). I would not, therefore, find waiver based on the fact that the defendant (or more accurately, his counsel) alleged a constitutional violation on two grounds, emphasizing one and referring to the other by means of a footnote.

With respect to whether or not the government's conduct violated White's privilege against self-incrimination, it is clear that White was not directly compelled to produce incriminating documents and other information to his attorney, Mark Center. *See Fisher v. United States*, 425 U.S. 391, 401 (1976) ("the Fifth Amendment protects against 'compelled self-incrimination, not [the disclosure of] private information' ") (citation omitted). However, it is also clear that Mr. White had to communicate with his attorney in order to obtain representation in his bankruptcy. In order to protect the traditional purpose of the attorney-client

privilege—"to encourage clients to make full disclosure to their attorneys"—the *Fisher* Court held that an attorney is not bound to produce documents if the client would be privileged from production. *Id.* at 403-05.

Although there is apparently no general Fifth Amendment protection for papers, *see United States v. Doe*, 465 U.S. 605, 610-12 (1984) (Fifth Amendment protection does not extend to business records, even though held personally by the party claiming the privilege), that amendment must protect at least incriminating conversations and documents produced for the purpose of representation, whether held by the attorney or client. *See United States v. Davis*, 636 F.2d 1028, 1041 (5th Cir.) (finding that the *Fisher* requirement that a document privileged in the hands of an attorney be privileged in the hands of the client is inapplicable where the communications for the purpose of representation were not pre-existing records), *cert. denied*, 454 U.S. 862 (1981). Absent such protection, a party is forced to choose between free communication with an attorney or complete silence based on the Fifth Amendment, a choice which one should not have to make and which the decided cases make clear one does not have to make. It is possible, of course, for a party to waive the Fifth Amendment, but it is clear that one is not forced to risk waiving the right against self-incrimination just to be able to speak to an attorney. Such a result conflicts with the purposes served both by the privilege against self-incrimination as well as the attorney-client privilege.

Given the fact that neither counsel for the defendant nor the trial court examined the documents in question nor are they available for our examination, there is no way of determining anything about them. Nor do we know if Center disclosed privileged and incriminating information to the government in their various conversations prior to his testifying before the grand jury on two separate days. Given the fact that the information obtained from Center was apparently important to the indictment and conviction and may, for all we know, have been the only information the government had, at least

at the outset, it is highly likely that it was incriminating of Mr. White or led to incriminating evidence.

It is hornbook law, of course, that an attorney may not waive the client's privilege. As indicated, there is a Fifth Amendment protection against the disclosure by an attorney of privileged incriminating information divulged by a client to the attorney for the purpose of representation. Whether or not that privilege was violated by Mark Center's conduct in this case depends, of course, on the nature and substance of Center's disclosures to the government. Since the trial judge declined to hold a hearing on the matter or to examine the documents or to permit defense counsel to do so and since Center's grand jury testimony is also not part of the record here, there is no way for us to determine if Mr. White's Fifth Amendment privilege was violated.

The second potential Fifth Amendment violation, as the majority recognizes, is that the government's conduct violated the due process clause of that amendment. The majority observes that if "the government, having the kind of hold over an attorney that it had over Center—for when it approached him he had been convicted but not yet sentenced—extracts from him client secrets that it then uses in a criminal trial of the client to the latter's substantial prejudice, this might be the kind of serious governmental misconduct that would violate a criminal defendant's rights under the due process clause of the Fifth Amendment." *Ante* at 9. *See United States v. Kleifgen*, 557 F.2d 1293, 1297 (9th Cir. 1977); *United States ex rel. Shiflet v. Lane*, 815 F.2d 457, 465-66 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 1234 (1988); *United States v. Fortna*, 796 F.2d 724, 733 (5th Cir. 1986); *United States v. Rogers*, 751 F.2d 1074 (9th Cir. 1985).

The majority goes on to say that the mere fact that "no privileged documents were actually introduced in evidence (and this we have only on the government's say-so) need not be crucial . . ., if privileged documents or other privileged communications were used to obtain evidence

that *was* placed in evidence—a matter on which the government's affidavit is silent." *Ante* at 8.

Having said all of the foregoing with which I agree, the majority then rightly says that the issue of whether the government made use of "privileged documents" should preferably be resolved on a "full record." It seems to me that a full record will require a hearing to determine not only what possibly privileged and incriminating information the stolen documents contained but also what similar information Center may have disclosed orally in the several conversations he apparently had with government counsel. Such a hearing should also explore what information concerning the Whites, if any, the government had before Center's disclosure, exactly what was said between government counsel and Center about how he was to obtain or did obtain the documents he turned over, and whether Center's grand jury testimony contained privileged information.

I am surprised, therefore, at the suggestion that the trial judge may conduct an *in camera* examination of the documents Center produced and his grand jury testimony and determine whether an evidentiary hearing in which defense counsel could participate should be held to resolve the issue. If, based on her examination of the documents and the grand jury transcript, she can determine that no error of constitutionalal magnitude occurred, the majority says, then there need be no hearing.

This procedure completely ignores the most probable means by which privileged incriminating information would have been disclosed by Center to government counsel, their conversations before Center's grand jury appearances. We do not even know how many such conferences there were, when they were held, how long they lasted and above all, what Center said. I assume that the Assistant U.S. Attorney or whoever else was present at those conferences took notes which are still available to refresh the participants' recollections.

Moreover, only with a hearing in which defense counsel can participate and contribute to the resolution of whether or not his client's Fifth Amendment rights were violated can a "full record" be made.

I know of no way without a hearing that the trial judge or, ultimately, this court on appeal can determine if the government's conduct violated Richard White's Fifth Amendment rights. It is possible that government counsel had little information concerning the Whites' bankruptcy until Center, under pressure from government counsel, particularly after having failed in one effort to obtain evidence against someone else, suggested he might obtain incriminating evidence against the Whites. Government counsel and he may well have discussed how he was to obtain it, including rifling the files of his former law firm. In fact, this may well have been the only way he could have obtained the documents he turned over to the government. Apart from the question of privilege, these were stolen documents and the government in receiving them, if it knew how they were obtained, may well have been an accessory to their theft, if not before then after the fact.

On the other hand, Center may never have discussed how he was going to obtain evidence to be used against the Whites with government counsel. It is difficult to believe, however, that at no time did the government learn that the documents he turned over were either copied or removed from the Whites' file at the law firm.

Whatever the facts, they must be determined, a conclusion with which I believe the majority agrees. Without a hearing at which the facts can be fully explored, however, I do not see how that can be accomplished or a full record made from which an appellate court can review whatever determination the trial judge makes on the potentially serious constitutional questions here involved.

I would, therefore, remand for a hearing with no suggestion that the district judge can resolve the constitu-

tional issues *in camera* while at the same time making a full record. I simply do not believe that is possible.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 13, 1989.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. HUBERT L. WILL, *Senior District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 88-1925, 88-1926 v.

JUDITH E. WHITE,
RICHARD L. WHITE,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Indiana.
No. IP 87-123-CR—**Sarah Evans Barker**, *Judge.*

ORDER

On July 31, 1989, defendant-appellant Richard L. White filed a petition for rehearing with suggestion for rehearing en banc in No. 88-1926. A majority of the judges on the original panel have voted to deny the petition, and

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* Hon. Hubert L. Will of the Northern District of Illinois, sitting by designation.

none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

On September 1, 1989, plaintiff-appellee filed a petition for rehearing in No. 88-1925. All of the judges on the original panel have voted to deny the petition. The petition is therefore DENIED.

[DATED FEBRUARY 19, 1988]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 87-123-CR

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD L. WHITE
JUDITH E. WHITE,

Defendants.

ENTRY

The matter is before the court on the motion of the defendants Richard L. White and Judith E. White to dismiss or, in the alternative, to suppress evidence. The motion was filed February 18, 1988, one and one-half workdays in advance of the trial. The government's response was submitted to the court on February 19, 1988, along with the government's "Motion for Order Directing In Camera Production of Legal Files by Bamberger & Feibleman." The court's rulings and reasons therefor are set forth below.

The defendants Richard White and Judith White maintain, in support of their motion, that "the indictment in this matter is the result of confidential information which was communicated to the government by Mark Center, an attorney who represented these defendants in the personal bankruptcy which has been made an issue herein" and that "the information in question was encompassed

by a valid attorney-client privilege which the defendants have never waived."

As a result of this alleged violation, the defendants contend that the indictment must be dismissed or, in the alternative, that all evidence provided by and/or resulting from the violation be suppressed. The defendants cite no specific evidence obtained through the alleged violation of the privilege; rather, they implicitly seek a hearing, as well as an order allowing them to examine the government's evidence in order for them to make the appropriate claims of privilege with regard to the evidence.

The government defends against the motions of defendants claiming they are nothing more than thinly-veiled attempts by the defendants to obtain impermissible discovery. The attorneys for the government buttress this claim by citing the fact that they have provided full disclosure of the documents they intend to introduce in their case-in-chief and no claim of privilege has been asserted as to any of those documents, and further they state they do not intend to call as a witness the former lawyer for defendants to whom privileged communications may have been imparted by the defendants.

The defendants' primary premise upon which the motions are based is that government intrusion into the attorney-client relationship in this case would constitute a deprivation of the sixth amendment right to effective assistance of counsel. They point out in this context that some courts have addressed the sixth amendment question by determining whether the disclosure of privileged information results in prejudice to the defendant and then by determining whether that prejudice can be remedied by a new trial or suppression of the evidence. *See, e.g., Bishop v. Rose,* 701 F.2d 1150 (6th Cir. 1983). Other courts have held, however, that disclosure of privileged information to the government is a per se violation of the sixth amendment warranting dismissal of the indictment. *See, e.g., United States v. Levy,* 577 F.2d 200 (3d Cir. 1978).

In this case neither suppression nor dismissal is warranted, because the defendants' reliance on the sixth amendment is entirely misplaced. None of the cases propounded by the defendants addresses the circumstances presented in this case, where an alleged violation of the privilege may have been committed by an attorney who represented defendants in previous matters, rather than by the attorney representing the defendants in the instant case. Every decision cited by the defendants is based on governmental intrusion into the criminal defendant's relationship with his defense counsel in the case then at bar. This distinction is crucial, and the defendants have offered no argument or authority to explain how the alleged violation has deprived them of effective assistance of counsel in this case as that right has been articulated under the sixth amendment.

The defendants also suggest that violation of the privilege by the former lawyer implicates fifth amendment considerations because his communications will be, in effect, self-incriminating to them. The defendants cite no authority for this proposition, and, indeed, courts have held that an attorney cannot invoke the privilege against self-incrimination on the ground that the answer would incriminate his client. *See, e.g., United States v. Goldfarb*, 328 F.2d 280, 282 (6th Cir. 1964). Similarly, under the fifth amendment, a client's right against *self* incrimination is limited to words he himself might utter and not to the words of anyone else; it is an altogether personal privilege. *Couch v. U.S.*, 409 U.S. 322 (1973); *Fisher v. U.S.*, 425 U.S. 391 (1976). Therefore, an alleged violation of the attorney-client privilege by the attorney does not constitute a violation of the client's fifth amendment rights.

Because the alleged violation of the attorney-client privilege does not rise to constitutional dimension, what remains is the defendants' assertion of a testimonial privilege. That testimonial privilege—not unlike the marital communications privilege, priest-penitent privilege, or physician-patient privilege—is properly asserted as a trial

objection to be interposed as a challenge to any evidence offered at trial which is violative of the privilege. A challenge to the evidence or its exclusion is not properly advanced in a motion to dismiss, a motion to suppress, or a motion to compel discovery. Violations of the privilege may, of course, form the basis of a civil action for damages against the party in violation of the privilege. However, evidence gathered as a result of what might otherwise be impermissible disclosures of privileged information is not suppressible on that basis. In other words, the attorney-client privilege does not, in itself, give rise to an exclusionary rule that would render inadmissible the "fruits" of information gained in violation of the privilege. *See generally McCormick on Evidence,* §§ 165-166 at 445-455 (3d ed. 1984).

In light of these conclusions, the court DENIES the defendants' motion to dismiss or suppress the evidence. The defendants have been provided rule 16 discovery and, according to the parties' representations to the court, are now in possession of all the documents the government will introduce as part of its case-in-chief, and to which they have not asserted the attorney-client privilege. Furthermore, the government has stipulated that it will not call the attorney in question as a witness in its case-in-chief, so a violation of the privilege does not appear imminent in that regard. As to any other evidence objectionable on this ground, the court reserves its rulings until such time, if ever, as the evidence is actually offered.[1]

For these reasons, the court also DENIES the government's motion for production of the Bamberger & Feibleman files for purposes of an in camera inspection.

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[1] The court also notes the possibility that the privilege may be waived by the defendants in the course of their testimony, if any, at trial, or that the privilege, by virtue of its exceptions, may not apply.

This ruling also resolves the issues that remained with regard to the defendants' discovery requests, constituting a denial of defendants' requests in paragraphs 1, 2, 3, 5, and 6.

It is so ORDERED this 19th day of February, 1988.

/s/ Sarah Evans Barker
Sarah Evans Barker, Judge
United States District Court
Southern District of Indiana

[DATED FEBRUARY 18, 1988]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP 87-123-CR

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD L. WHITE,
JUDITH E. WHITE,

Defendants.

DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO SUPPRESS EVIDENCE

Richard L. White and Judith E. White, named as defendants in the above-captioned matter, respectfully moves, by and through their attorneys, Royal B. Martin, Jr., and Linda L. Pence, for the dismissal of the indictment returned in this matter or, in the alternative, for the suppression of all evidence provided by and/or resulting from information provided by attorney Mark Center for the reason that:

1. Upon information and belief, Center provided privileged information to the government which, in turn, presented that information to the grand jury which returned the indictment in this matter;

2. Any and all privileged information which was presented to the grand jury was unauthorized in-

asmuch as the defendants have not waived the attorney-client privilege which attached thereto;

3. Center's conduct in providing such information violated the attorney-client privilege and certain ethical precepts, the consequences of which are more fully set forth in the attached Memorandum of Law in Support of Motion to Dismiss or, in the Alternative, to Suppress Evidence;

4. Absent the presentation of this privileged information, there would not be a factual basis to support an indictment.

In view of the foregoing, it is imperative that the Court convene a hearing upon this issue and, at the conclusion thereof, grant such relief as will make the defendants whole and deny the government any advantage resulting from its unauthorized use of improperly obtained information encompassed by the attorney-client privilege.

WHEREFORE, defendants Richard L. White and Judith E. White respectfully request that the Court convene a hearing upon this motion and, pursuant thereto, (a) enter an Order dismissing the indictment which issued in the above-captioned matter, or, in the alternative, (b) suppressing all evidence provided by and/or resulting from information provided by attorney Mark Center and any other attorney, agent or employee of an attorney who represented the defendants herein with respect to the personal bankruptcy which has been made the subject of this indictment.

Respectfully submitted,

/s/ Royal B. Martin, Jr.
Royal B. Martin, Jr.
Attorney for Richard L. White

/s/ Linda L. Pence
Linda L. Pence
Attorney for Judith E. White

/s/ Susan Brooks
Susan Brooks
Co-Counsel for Richard L. White

App. 28

[DATED FEBRUARY 18, 1988]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IP 87-123-CR

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD L. WHITE,
JUDITH E. WHITE,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO SUPPRESS EVIDENCE

As is recited in the affidavits which are submitted in support of the defendants' Motion,[1] the indictment in this matter is the result of confidential information which was communicated to the government by Mark Center, an attorney who represented these defendants in the personal bankruptcy which has been made an issue herein. As is recited in the Motion itself, the information in question was encompassed by a valid attorney-client privilege which the defendants have never waived.

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[1] The Motion to Dismiss or, in the Alternative, to Suppress Evidence will be referenced herein as "the Motion."

The communications between Center and the government, were, therefore, in breach of that privilege and in violation of certain ethical obligations which are imposed upon all attorneys at law. Because Center violated the privilege and his ethical obligations as an attorney at law, the indictment must be dismissed or, alternatively, all evidence provided by and/or resulting from his conduct must be suppressed.

I. *Attorney-Client Privilege*

The attorney-client privilege is "the oldest of the privileges for confidential communications." 8 J. Wigmore, *Evidence in Trials at Common Law* §2290 (McNaughton rev. 1961) [hereinafter, "Wignore at §____"]. " 'The first duty of an attorney,' it has been said, 'is to keep the secrets of his clients.' " *Id.*, quoting *Taylor v. Blacklow*, 3 Bing. N.C. 235, 249, 132 Eng. Rep. 401, 406 (C.P. 1836) (Gaselee, J.).

This duty, and the privilege which derives therefrom, is founded upon the policy that "[i]n order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent." Wigmore at §2291.[2] It is

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[2] *See also Washington v. State*, 441 N.E.2d 1355 (Ind. 1982) (an attorney "has a legal and ethical duty to maintain the confidences and secrets of a client"); *Colman v. Heidenreich*, 366 N.E.2d 686 (Ind. App. 1977), *vacated* 269 Ind. 419, 381 N.E.2d 866 (1978) ("The duty of an attorney to not reveal the secrets and confidences of his client is a sacred trust based upon the necessity of having a free flow of information from the client to the attorney").

> The attorney-client privilege is a very important provision in our law for the protection of persons in need of professional legal help. It makes provision for a person to give complete and confidential information to an attorney, so that the attorney may be fully advised in his services to the client. At the same time, it assures the client that these confidences will not be violated.

Colman v. Heidenreich, 269 Ind. 419, 422, 381 N.E.2d 866, 868 (1978).

for this reason that, although "[u]nder the original theory of the privilege" it was held to belong to the attorney rather than to the client, "under the modern theory . . . it is plainly the client's, not the attorney's." Wigmore at §2321.[3]

Wigmore has provided the classic formulation of the privilege:

> (1) *Whenever legal advice of any kind is sought* (2) *from a professional legal adviser in his capacity as such,* (3) *the communications relating to that purpose,* (4) *made in confidence* (5) *by the client,* (6) *are at his instance permanently protected* (7) *from disclosure by himself or by the legal adviser,* (8) *except the protection be waived.*

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[3] The general rule is not disputed that confidential communications between client and attorney are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client, and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose, and the law holds their testimony incompetent.

Chirac v. Reinicker, 11 Wheat 280, 294 (1826), quoted in *Lorimer v. Lorimer,* 124 Mich. 631, 83 N.W. 609, 611 (1900). *See also Jenkinson v. State,* 5 Blackf. 465 (1840):

> The policy of the law requires, that when an attorney is consulted on business within the scope of his profession, the communication on the subject between him and his client should be treated as strictly confidential. It is not material, whether the evidence relate to what was said by the attorney, or what was said by the client, in their private conversation on the business in which the attorney was professionally employed. *The statements of each to the other, in such cases, must be considered as privileged communications; and the attorney should neither be required nor permitted, by any judicial tribunal, to divulge them against his client, if the latter object to the evidence.*

5 Blackf. at 466-67 [emphasis added].

Wigmore at §2292 [emphasis in original], quoted in *Colman v. Heidenreich*, 366 N.E.2d 686 (Ind. App. 1977), *vacated* 269 Ind. 419, 381 N.E.2d 866 (1978).

The privilege is firmly established by "[s]everal Indiana statutes and rules." *Colman v. Heidenreich*, 269 Ind. 419, 381 N.E.2d 866 (1978), citing Ind. Code §34-1-60-4 (Burns 1973); Oath of Attorneys, Ind. R. Adm. & Dis. 22 ("I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself"); ABA Canons of Professional Ethics No. 11 at EC 4-1, DR 4-101(A). As an Indiana attorney, Center was obliged to honor the privilege that is so established.[4]

Although either the attorney or the client can assert the privilege, only the client can waive the privilege.[5] *McCormick on Evidence* §93 (3d ed. 1984); *see also Kevlik v. Goldstein*, 724 F.2d 844 (1st Cir. 1984); *Buuck v. Kruckeberg*, 121 Ind. App. 262, 95 N.E.2d 304 (1950). The client's control over the exercise of the privilege is essential for the furtherance of the policy from which it is derived:

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[4] As an Indiana attorney, Center was also obliged to conform his conduct to that dictated by the Indiana Rules of Professional Conduct which, as recently revised, provide that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation" except as explicitly authorized in that provision. *See* Indiana Rules of Professional Conduct, Rule 1.6; *see also* §II, *infra*.

[5] " 'The person who was the lawyer at the time of the communications may claim the privilege but only on behalf of the client.' This statement ensures that the privilege belongs to the client and not to the lawyer and survives termination of the relationship." 2 J. Weinstein & M. Berger, *Weinstein's Evidence* para. 503(c)[01] (1986), quoting Supreme Court Standard 503(c) ("Lawyer-Client Privilege"). "Since . . . it is the client who is the holder of the privilege, the power to waive it is his, and he alone, or his . . . agent acting with his authority, or his representative may exercise this power." *McCormick on Evidence* §94 (3d ed. 1984) [note omitted]; *see also Buuck v. Kruckeberg*, 121 Ind. App. 262, 95 N.E.2d 304 (1950).

> The subjective freedom of the client, which it is the purpose of the privilege to secure . . . could not be attained if the client understood that, when the relation ended or even after the client's death, the attorney could be compelled to disclose the confidences, for there is no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate. It has therefore never been questioned, since the domination of the modern theory, that the privilege continues even after the *end of the litigation* or other occasion for legal advice and even after the *death of the client.*

Wigmore at §2323 [emphasis in original & notes omitted]; *see also McCormick on Evidence* §94 (3d ed. 1984); *Buuck v. Kruckeberg,* 121 Ind. App. 262, 95 N.E.2d 304 (1950).

The privilege also continues in force and effect even after the termination of the lawyer-client relationship. *See, e.g., In re Grand Jury,* 106 F.R.D. 255, 258 (D.N.H. 1985) ("The privilege belongs to and may be waived only by the former client; the attorney may not terminate the privilege unilaterally"); Wigmore at §2324 ("That the *attorney* himself is prohibited [from waiving the privilege], whether he is willing or not, is of course the fundamental assumption of the modern theory").[6] As Wigmore notes,

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[6] *See also Kevlik v. Goldstein,* 724 F.2d 844, 849 (1st Cir. 1984); *American Can Company v. Citrus Feed Company,* 436 F.2d 1125, 1128-29 (5th Cir. 1971); *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.,* 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953); *Foster v. Buchele,* 213 S.W.2d 738 (Tex.Civ.App. 1948); *U.S. v. Kleifgen,* 557 F.2d 1293 (9th Cir. 1977); *Univeral Athletic Sales Co. v. American Gym, Recreational & Athletic Equipment Corp., Inc.,* 546 F.2d 530 (4th Cir. 1976), *cert. denied,* 430 U.S. 984 (1977); *Hunt Intern Resources Corp. v. Binstein,* 98 F.R.D. 689 (N.D.Ill. 1983); *Washington v. State,* 441 N.E.2d 1355 (Ind. 1982) ("An attorney . . . has a legal and ethical duty to maintain the confidences and secrets of a client, but during and subsequent to the attorney-client relationship").

> [c]learly the privilege could not permit an evasion by receiving the voluntary extrajudicial disclosures of the attorney. Supposing them to be somehow admissible in spite of the hearsay rule, they would be equally a violation of the privilege with his voluntary disclosures on the stand. If his disclosure has taken the form of handing a confidential document to a third person, the objection is equally forcible, and the question is not complicated with the hearsay rule.

Wigmore at §2325. Wigmore then notes that although involuntary disclosures resulting from "the loss or theft of documents from the attorney's possession are not encompassed within the privilege, voluntary disclosures are encompassed for the reason that "[i]t is fair to put on the client the risk of a careless attorney, *but not of an intentionally unfaithful one.*"[7] *Id.* at n. 2 [emphasis added].

The facts presented in the affidavit submitted in support of the defendants' motion to dismiss or suppress establish that these defendants are the victims of "an intentionally unfaithful" attorney; the question that remains outstanding is what consequences this attorney's betrayal of the attorney-client privilege must have for this proceeding. The answer to that question is present in sub-sections (A) and (B), below.

A. *Consequences of Violating the Attorney-Client Privilege*

> In our system of criminal justice, the attorney-client relationship is insulated from governmental intrusion by the Sixth Amendment's guarantee of the right to counsel. . . . Thus, if the government illegally intrudes into the attorney-client relationship, the evidentiary rewards of that intrusion may not taint any subse-

[7] Since Wigmore wrote, the law has become rather more favorable on this issue, so that inadvertent disclosures have been held to be encompassed by the privilege. *See, e.g., In re Dayco Corp. Derivative Securities Litigation,* 102 F.R.D. 468 (S.D. Ohio 1984).

> quent judicial proceedings, . . . whether that evidence is offered against the client . . . or the attorney. . . . The use of such evidence violates the Sixth Amendment.

United States v. King, 536 F. Supp. 253, 263 (C.D. Cal. 1982), citing *Massiah v. United States*, 377 U.S. 201 (1974); *Weatherford v. Busey*, 429 U.S. 545 (1977); *United States v. Valencia*, 541 F.2d 618 (6th Cir. 1976); *United States v. Zarzour*, 432 F.2d 1, 3-5 (5th Cir. 1970); *Black v. United States*, 385 U.S. 26, 28-29 (1966); *United States v. Orman*, 417 F. Supp. 1126 (D. Colo. 1976). *See also United States v. Henry*, 447 U.S. 264 (1980); *United States v. Martinez*, 785 F.2d 111 (3d Cir. 1986).

Typically, "government intrusion" into "the attorney-client relationship" takes the form of utilizing an informant who poses as the defendants' friend to ascertain defense strategy,[8] eavesdropping on privileged attorney-client conferences by means of electronic surveillance devices,[9] infiltrating a criminal conspiracy with an informant who poses as a member and who remains in that capacity until or throughout trial[10] or other, similar techniques. What is unique about this situation is that the government was not required to utilize any of these techniques; instead, the defendants' own, "intentionally unfaithful" attorney was the agency by which the intrusion was accomplished.

This is not a situation which appears to have arisen before, at least not in the published decisions in this area. However, the means by which the intrusion was achieved should not alter the analysis which is employed in determining what, if any, consequences the intrusion must have for pending or contemplated proceedings.

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[8] *See, e.g., Hoffa v. United States*, 385 U.S. 293 (1966).

[9] *See, e.g., O'Brien v. United States*, 386 U.S. 345 (1967); *Black v. United States*, 385 U.S. 26 (1966).

[10] *See, e.g., Weatherford v. Bursey*, 429 U.S. 545 (1977); *Briggs v. Goodwin*, 698 F.2d 486 (D.C. Cir. 1983).

Since the focus of this analysis is the *effect* which the breach of the attorney-client privilege must have upon such proceedings, the source of the breach should not be relevant except in one respect: Insofar as the case law in this area is concerned with the viability of an ongoing attorney-client relationship which is essential to the presentation of a defense to the charges against the client,[11] it cannot apply to the present situation for the reason that the attorney-client relationship between the defendants and Mark Center (a) was undertaken for purposes other than the defense of this proceeding, and (b) is not directly at issue in this matter, since the defendants are represented by the undersigned in this proceeding.

However, insofar as the case law in this area is concerned with prejudice to the defendants which result from a breach of the attorney-client relationship, it does apply to the present proceeding. The case law in question supports either of two propositions, depending upon the predilections of particular courts:[12] One proposition is that "a Sixth Amendment violation occurs if . . . privileged information resulting from an unintentional intrusion [into an attorney-client relationship] is disclosed and prejudice results" to the defendants. *Bishop v. Rose*, 701 F.2d 1150, 1156 (6th Cir. 1983).[13]

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[11] *See, e.g., United States v. King*, 536 F. Supp. 253, 264 (C.D. Cal. 1982); *United States v. Morrison*, 449 U.S. 361 (1981); *United States v. Henry*, 447 U.S. 264 (1980); *People v. Mason*, 97 Misc. 2d 706, 411 N.Y.S.2d 970 (1978).

[12] *See* B. Gershman, *Prosecutorial Misconduct* § 1.6(c) (1987).

[13] In this passage, the Sixth Circuit is describing the interpretation of *Weatherford v. Bursey* which the Second Circuit articulated in *United States v. Dien*, 609 F.2d 1038, 1043 (2d Cir. 1979). Under this interpretation, a Sixth Amendment violation results (a) from an intentional invasion of the relationship, or (b) from an unintentional invasion which results in the disclosure described in the above-quoted statement. Because the invasion in the present instance was not the product of the government's action or volition, the discussion above proceeds on the assumption that the less favorable "unintentional invasion" standard applies.

The second proposition is that the disclosure of privileged information to prosecution authorities is a per se violation of the Sixth Amendment. *See, e.g., United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978) ("We think that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case"). *Accord, United States v. Kember*, 648 F.2d 1354, 1365 (D.C. Cir. 1980). Courts which consider disclosure to be a per se violation "do not try to weigh the amount of prejudice, but either invalidate the conviction or dismiss the indictment."[14]

Under the analysis which results from the application of the first proposition, the remedy "should be tailored to the injury suffered from the constitutional violation, that is, remedies should be limited to denying the government use of the results of its intrusion." *United States v. Solomon*, 679 F.2d 1246, 1250 (8th Cir. 1982). This means that "dismissal of the indictment . . . is unnecessary when the prejudice to the defendant can be remedied by a new trial or the suppression of evidence."[15] 679 F.2d at 1250, citing *United States v. Morrison*, 449 U.S. 361, 365 n. 2 (1981). Conversely, this also means that dismissal is warranted whenever the tainted evidence so permeates the proceeding that suppression would be unavailing as a remedy for the prejudice which results from the invasion of the attorney-client privilege.[16]

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[14] B. Gershman, *Prosecutorial Misconduct* §1.6(c)(3) (1987), citing *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978); *United States v. Kember*, 648 F.2d 1354 (D.C. Cir. 1980); *United States v. Orman*, 417 F. Supp. 1126 (D. Colo. 1976); *Barber v. Municipal Court*, 24 Cal. 742, 598 P.2d 818, 157 Cal. Rptr. 658 (1979).

[15] "Prejudice . . . results when evidence gained through the interference [with the attorney-client relationship] is used against the defendant at trial." *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980).

[16] "The [Supreme] Court in *Morrison*, however, did leave open the caveat that perhaps the dismissal of an indictment could be

(Footnote continued on following page)

The application of this analysis to the present proceeding requires the conclusion that suppression is inadequate to protect the defendants from prejudice resulting from the violation of their attorney-client relationship with Mark Center given that it was this violation which provided the evidence that was used to procure the return of this indictment. In other words, this proceeding is founded upon the violation of the defendants' attorney-client privilege; that being the case, it would be impossible to suppress all of the evidence resulting from that violation and still proceed with the adjudication of the matters at issue in the indictment. The only viable alternative is to dismiss the indictment, thereby terminating this proceeding.

Although this precise situation does not appear to have arisen before, at least in the published decisional law, *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978) presented an analogous situation. In *Levy*, a co-defendant, who was actually a government informant, disclosed defense strategy to the government. 577 F.2d at 202-03. Levy was convicted and appealed, arguing that this tactic violated his Sixth Amendment right to counsel. *Id.* at 208-09.

The Third Circuit reversed the conviction and remanded the matter to the district court for the entry of an order dismissing the indictment. *Id.* at 211. Although the court reached this result by applying the per se rule, which was described above, the opinion includes a passage describing the pragmatic difficulties attendant upon remedying violations of the attorney-client privilege under the "prejudice" rule:

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[16] *continued*

appropriate when there was continuing prejudice from the constitutional violation that could not be remedied by a new trial or suppression of evidence." *United States v. Rogers*, 751 F.2d 1074, 1078 (9th Cir. 1985), citing *United States v. Morrison*, 449 U.S. 362, 366 n. 2 (1981).

> In our judgment, the only appropriate remedy is the dismissal of the indictment. . . . Any effort to cure the violation by some elaborate scheme, such as by bringing in new case agents and attorneys from distant places, would involve the court in the same sort of speculative enterprise which we have already rejected. Even if new case agents and attorneys were substituted, we would still have to speculate about the effects of the old case agents' discussions with key government witnesses.

Id. at 210.

The difficulties inherent in utilizing the "prejudice" rule in the present proceeding are also illustrated by the Sixth Circuit's decision in *United States v. Valencia*, 541 F.2d 618 (6th Cir. 1976). In *Valencia*, the issue was whether a defendant, who had been convicted of drug trafficking, was irretrievably prejudiced by the government's utilizing an informant, who posed as the attorney's "girl friend and secretary", to invade his relationship with that attorney.[17] *Id.* at 620.

The Sixth Circuit remanded the proceeding to the district court "to determine whether any of the evidence produced" against the defendant was obtained through the informant. *Id.* at 623.

> The only evidence that should have been used . . . was information that the Government obtained independently of and unrelated to [the informant's] disclosures. If the [defendant] demonstrate[s] that tainted evidence was used at the trial and the Government fails to carry its burden that the evidence was untainted, the district court should order a new trial, at which the tainted evidence cannot be used.

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[17] The "secretary" provided government agents with materials from the attorney's files, including a file on the defendant in question. *Id.* at 621.

Id. at 623-24. In entering this order, the court was careful to note that "the ultimate burden is upon the prosecution to demonstrate" that the conviction was "the result of untainted evidence. *Id.* at 623, citing *Alderman v. United States*, 394 U.S. 165, 183 (1969).

Levy and *Valencia* illustrate, therefore, that this Court has the following alternatives for redressing the violation of the attorney-client privilege perpetrated by Mark Center: (1) It can apply the per se rule and dismiss the indictment; or (2) it can apply the "prejudice" rule and convene an evidentiary hearing the purpose of which is to identify evidence provided by, and/or resulting from information provided by, Center so that such evidence can be suppressed.

The defendants respectfully request that the Court apply the per se rule and dismiss the indictment; if, however, the Court does not feel that this is appropriate, then the defendants respectfully request that all evidence provided by, or traceable to, Mark Center's contacts with the prosecutors be identified and suppressed pursuant to the "prejudice" rule.

B. *Violation of Attorney-Client Privilege as Implicating Fifth Amendment Considerations*

In his discussion of the attorney-client privilege, Wigmore notes that, at least in criminal proceedings, "because the communications will . . . be in effect self-incriminating admissions, . . . if they could be obtained from the attorney, some of the same evils would follow which . . . constitute the reasons for forbidding compulsory self-incrimination." Wigmore at §2291. Indeed, one has only to consider the consequences of actions such as Center's to understand that sanctioning his conduct, by refusing to dismiss the indictment or suppressing evidence resulting from that conduct, results in a *de facto* violation of the privilege against self-incrimination which is guaranteed by the Fifth Amendment to the United States Constitution.

Assuming that an attorney honors his obligations under the attorney-client privilege, individuals are protected against compelled self-incrimination by the following means: An individual who finds himself in peril of criminal prosecution can seek out legal advice, divulging the circumstances which have produced that peril, and which may, in fact, be incriminating, to his chosen counsel.

At this point, the attorney-client privilege comes into play, so that the attorney can assert that privilege as the bar to being required to disclose the self-incrimination statements which the client made in the course of their consultation. And the client can assert his Fifth Amendment privilege against self-incrimination to prevent disclosure of those same statements. The result is that the client can exercise his Sixth Amendment right to counsel without jeopardizing his Fifth Amendment right to be free of compelled self-incrimination.[18]

Assume, however, that, as has occurred in the present matter, the attorney willfully and faithlessly violates his privilege by contacting law enforcement authorities and disclosing to them the communications which were made under the guise of the attorney-client privilege and the Sixth Amendment right to counsel. If this violation is permitted to stand, then the effect will be (a) to deny the client his Sixth Amendment right to counsel, and (b) to deny the client his privilege against self-incrimination, as his attorney becomes the means by which his incriminatory statements are transmitted to the authorities.

In *United States v. Morrison*, 449 U.S. 361 (1981), the Court indicated that the proper remedy for the government's having acquired evidence in violation of the Fifth

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[18] *See generally* 24 C. Wright & K. Graham, *Federal Practice and Procedure: Federal Rules of Evidence* §5472 (1986); Comment, *The Attorney-Client Privilege in Alabama*, 23 Ala. L. Rev. 641, 644 (1977); Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 Rutgers L. Rev. 332, 365-67 (1976).

Amendment is the suppression of the evidence in question. 449 U.S. at 365-55 & n. 3, quoting *United States v. Blue*, 384 U.S. 251, 255 (1966). The defendants respectfully request, therefore, that if the Court elects not to dismiss the indictment for the reasons presented in §I(A), *supra*, or to suppress all evidence traceable to Mark Center's conduct for any of the reasons presented in §I(A) of this Memorandum, that the Court suppress the evidence in question for the reason that it was obtained as the consequence of a *de facto* violation of the defendants' Fifth Amendment right against compelled incrimination.[19]

II. *ETHICAL VIOLATION*

Rule 1.6(a) of the Indiana Rules of Professional Conduct[20] provides that

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[19] Support for this analysis appears in the Second Circuit's decision in *United States v. Valencia*, slip op., No. 86-1496 (August 5, 1987) (available on LEXIS, Genfed library, Courts file). In *Valencia*, the issue was whether the trial court properly excluded "from evidence out-of-court statements made by a defendant's counsel in his efforts to secure bail for his client." The Second Circuit found that the statements were properly excluded: "Weighing against use of the statements are the defendant's interests in retaining the service of his counsel, assuring uninhibited discussions between his counsel and the prosecutor, and avoiding the risk of impairing his privilege against self-incrimination." In an earlier portion of the opinion, the court referred to its decision in *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984), in which it

> emphasized that care must be exercised in the criminal context in determining under what circumstances attorney statements may be used against a client. . . . Our concern arose because the routine use of attorney statements against a criminal defendant risks impairment of the privilege against self-incrimination, the right to counsel of one's choice, and the right to the effective assistance of counsel.

Id. [note omitted].

[20] (Effective January 1, 1987), replacing the Code of Professional Responsibility. The new Rules of Professional Conduct constitute Indiana's adoption of the ABA's Model Rules of Professional Con-

(Footnote continued on following page)

> [a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

Paragraph (b) provides that a lawyer may reveal such information to the extent that he "reasonably believes" disclosure is necessary (1) to prevent the client from committing a crime, or (2) to defend himself against criminal charge or civil claims arising from "conduct in which the client was involved".[21]

The Comments to Rule 1.6(a) begin by enunciating the policies which animate the Rule,[22] and then go on to distinguish between the ethical obligation to respect a client's confidences and the evidentiary privilege which imposes a similar requirement:

> The principle of confidentiality is given effect in two related bodies of law, attorney-client privilege . . . in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in

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[20] *continued*

duct; prior to the adoption of these Rules, Indiana utilized the ABA's Model Code of Professional Responsibility as its criterion for ethical conduct. *See, e.g., ABA/BNA Lawyers' Manual on Professional Conduct* §01:101, §01:301.

[21] This portion of Rule 1.6(b)(2) also permits disclosure if the attorney reasonably believes that it is necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client," and/or "to respond to allegations in any proceeding concerning the lawyer's representation of the client." *Id.*

[22] "A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation." Rule 1.6, Comment.

> situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

Id.

A subsequent passage in the commentary to Rule 1.6 notes that "[i]f a lawyer is called as a witness to give testimony concerning a client, *absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable.*" Commentary, Rule 1.6 [emphasis added]. This exhortation is consistent with the policies embodied in the new rule:

> Rule 1.6 eliminate[d] the two-pronged duty under the Model Code in favor of a single standard protecting all information about a client 'relating to the representation.' Under [former] DR 4-101, the requirement applied only to information protected by the attorney-client privilege and to information 'gained in' the professional relationship that 'the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.' . . . Rule 1.6 imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental.

Id.

The Comments to the Rules of Professional Conduct also explicitly state that "[t]he duty of confidentiality continues after the client-lawyer relationship has terminated." *Id.* This is consistent with the standard that prevailed under the former rule. *See, e.g., Washington v. State*, 441 N.E.2d 1355 (Ind. 1982) ("ethical duty to maintain the confidences

and secrets of a client, both during and subsequent to the attorney-client relationship"), citing Code of Professional Responsibility, Ethical Canon 4-1 *et seq.*; *see also* ABA Informal Opinion 1301 (3/25.75).

The affidavits which are submitted in support of the defendants' Motion establish that Mark Center violated his ethical obligations under Rule 1.6. This violation may or may not be coequaled with the breach of the attorney-client privilege which is discussed in §I, *supra*, as the ethical precept is generally considered to be broader in scope than the privilege.[23]

Whether the provisions are coequal or not is irrelevant to the point which is presently at issue: It is clear that Mark Center violated his ethical obligations under Rule 1.6; it is equally clear that his violation of these obligations provided the government with evidence upon which it relied in obtaining the indictment that is at issue in this matter.

This means, therefore, that the indictment that is at issue in this matter is the product of a violation of the ethical obligations that are imposed upon all attorneys, including those who are charged with the task of prosecuting criminal offenses for the government. Indeed, the Comments to the Rules of Professional Conduct explicitly note that

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[23] *See, e.g.*, 24 C. Wright & K. Graham, Jr., *Federal Practice and Procedure: Federal Rules of Evidence* §5472 (1986), quoting ABA Code of Professional Responsibility, EC 4-4 (1969); *ABA/BNA Lawyers' Manual on Professional Conduct* 55:901-55:904 (1987). Without this assumption, the ethical precept does little more than re-state the attorney-client privilege. The Comments to the Rules of Professional Conduct also suggest that disclosure may be prohibited by the attorney-client privilege even when permitted by the Rules. *See* Preamble to Rules of Professional Conduct, at "Scope." This means, of course, that even assuming, *arguendo*, that Center's conduct was not a violation of the Rules of Professional Conduct, it could still constitute a breach of the attorney-client privilege, for the reasons which are presented in §I, *supra*.

> [a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice . . . . [K]nowing disregard of those obligations . . . could constitute a violation of Rule 8.4.

Comment to Rule 3.8, Indiana Rules of Professional Conduct.

Rule 8.4(a) provides that "[i]t is professional misconduct for a lawyer to . . . *violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or to do so through the acts of another.*" *Id.* [emphasis added]. The affidavits which have been submitted in support of this motion establish that the prosecutors in this proceeding either (a) "knowingly assist[ed] or induce[d] another" to violate the Rules of Professional Conduct, or (b) '[did] so through the acts of another", namely, Mark Center.

It is apparent, therefore, that the obligations of confidentiality which the Rules impose upon members of the bar have been violated by Mark Center, perhaps with the assistance, inducement and/or encouragement of counsel for the government. The only issue which remains to be determined is the response which this violation should elicit from the Court.

The traditional avenue of complaint for the redress of ethical violations is, of course, through the institution which is established for the licensing and disciplining of attorneys. Unfortunately, however, while this avenue may offer some solace in this instance, it is insufficient to remedy the evils which are attendant upon Center's conduct.

If Center's conduct goes unsanctioned by this Court, then it will mean that the government will be allowed to profit from conduct which was in direct derogation of what is perhaps the most fundamental precept of the common law, namely, the attorney's obligation to respect the confidences and secrets which are communicated by his

client. The only device which will prohibit the government's benefiting from Center's unethical conduct is that which is requested in the defendants' Motion, i.e., the dismissal of the indictment or the suppression of all evidence which is traceable to Center's conduct.

Therefore, the defendants respectfully request that this Court either dismiss the indictment in this matter or suppress all evidence which is traceable to Center's conduct, as described in the affidavits which are submitted in support of this motion.

Respectfully submitted,

/s/ Royal B. Martin, Jr.
Royal B. Martin, Jr.
Attorney for Richard L. White

/s/ Linda L. Pence
Linda L. Pence
Attorney for Judith E. White

/s/ Susan Brooks
Susan Brooks
Local Counsel for Richard L. White

Portion of Brief for Appellants Relating to Constitutional Violations

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Docket Numbers 88-1925 and 88-1926

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUDITH E. WHITE and
RICHARD L. WHITE,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division
Judge Sarah Evans Barker

BRIEF FOR APPELLANTS

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* * * * *

VI.

Defendants' Motion For An Evidentiary Hearing To Inquire Into The Violation Of The Attorney-Client Privilege Should Have Been Granted.

Mark Center and the law firm with which he was associated, Bamberger and Feibleman, were retained as bankruptcy counsel by Richard White to handle the Chapter 11 bankruptcy of White Petroleum. Subsequently, the firm and Mr. Center were retained to prepare the Chapter 7 personal bankruptcy of Mr. and Mrs. White. Center met extensively with Richard White (but never with Mrs.

White) about the personal bankruptcy, which was filed in December 1984.

In February 1987, Center was convicted of fraud in a matter entirely unrelated to his representation of White Petroleum or Mr. and Mrs. White. His partnership in Bamberger and Feibleman was terminated following his conviction. Sometime thereafter, he began cooperating with Assistant U.S. Attorney Jackie Bennett, the FBI, and the grand jury investigating the Chapter 7 of the defendants.

Assistant U.S. Attorney Bennett acknowledged that he considered issuing a subpoena duces tecum to Bamberger and Feibleman for the defendants' files. He did not do so, however, because of the attorney-client privilege implications.

Though discharged from the firm, Center returned to Bamberger and Feibleman's offices and was allowed to review, unattended, the files pertaining to the defendants' bankruptcy. He removed documents from the files and thereafter tendered them to the government. Center was advised by Thomas Titsworth that the documents he reviewed and took from the files were privileged. (R. 82). At no time did the defendants give their permission to Center. Nancy Dison, during her appearance before the grand jury investigating Mr. and Mrs. White, identified one of these documents as from Bamberger and Feibleman's filed on Mr. and Mrs. White.

Upon learning these facts, the defendants filed a motion to dismiss the indictment or, in the alternative, to suppress any evidence provided by Center. Moreover, Richard White's counsel, based upon the representations of Assistant U.S. Attorney Bennett, orally moved just prior to trial to dismiss the indictment for abuse of the

grand jury process or, at least, the convening of a hearing pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure to determine the underlying facts and to review the documents unlawfully taken by Center from Bamberger and Feibleman's files. The court denied both motions and refused to conduct any hearing.

Although the Federal Rules of Criminal Procedure do not expressly require a court to convene an evidentiary hearing on a motion to suppress, the better practice is to convene such a hearing whenever a motion alleges the grounds for suppression with sufficient particularity that there are readily identifiable factual averments which, if true, would entitle the movant to relief. *See, e.g., United States v. Ferguson,* 758 F.2d 843, 849 (2d Cir. 1985); *United States v. Dyer,* 609 F. Supp. 329, 330 (D.N.M. 1983). Indeed, the Seventh Circuit has explicitly recognized the virtues of convening such a hearing in order to arrive at the findings of fact required under Fed.R. Crim.P. 12(e) by stating

> [w]e address a final word to district judges. More than once we have directed that rulings on motions to suppress evidence be supported by findings of fact . . . . District judges are . . . admonished to make specific, detailed findings of fact in ruling on motions to suppress evidence.

United States v. Gusan, 549 F.2d 15, 20 (7th Cir. 1977), *cert. denied,* 430 U.S. 985 (1977).

Such hearings are described in a number of published decisions dealing with the issue raised in the defendants' Motion to Dismiss or Suppress, i.e., the constitutional impermissibility of allowing the government to benefit from a violation of the attorney-client privilege. *See, e.g., United States v. Fortna,* 796 F.2d 724, 729 (5th Cir. 1986), *cert. denied,* 107 S. Ct. 437 (1986) (hearing on motion to quash

indictment for violation of attorney-client privilege); *United States v. Keplinger*, 776 F.2d 678, 699 (7th Cir. 1985), *cert. denied*, 476 U.S. 1183 (1986) ("extensive, six-day hearing"); *United States v. Mastroianni*, 749 F.2d 900, 903 (1st Cir. 1984) ("extensive" evidentiary hearing); *United States v. Omni International Corp.*, 634 F. Supp. 1414, 1416 (D. Md. 1986) (hearing "occurring over the course of twenty-eight days"). These decisions illustrate the necessity for convening such a hearing.

This necessity was the explicit focus in *State v. Taylor*, 502 So.2d 537 (La. 1987). In *Taylor*, the Louisiana court held that the following procedure is necessary whenever a defendant has made out a claim that certain evidence is encompassed by the attorney-client privilege:

> [T]he trial court shall hold an evidentiary hearing in which the burden of proving the admissibility of those communications under an exception to the privilege is on the state as in the case of a confession or evidence seized without a warrant.
>
> . . . [T]he prima facie standard of proof does not afford adequate protection to the attorney-client privilege in criminal cases. Because of the importance of the privilege . . . the state must prove by a preponderance of the evidence that the attorney-client relationship was intended to further continuing or future criminal or fraudulent activity in order to vitiate the attorney-client privilege . . . Furthermore, the criminal or fraudulent activity in question must be proved by substantial, independent evidence without considering the allegedly privileged communications.

Id. at 541-42.

The *Taylor* opinion illustrates the importance attached to intrusions into the attorney-client privilege and the gravity with which courts treat accusations that an intru-

sion has occurred and has been exploited to the defendant's detriment and the government's benefit. Unfortunately, the trial court elected not to inquire into the accusation presented in this matter and, in so doing, committed error that entitles the defendants to a new trial.

The trial court erred by refusing to hold an evidentiary hearing in order to determine whether the defendants' attorney-client privilege had been violated.[4] The court committed reversible error by denying defendants the opportunity to present evidence establishing that: (1) the privilege had been violated and (2) the government was unconstitutionally, unethically and impermissibly exploiting this violation to its benefit and their prejudice.

* * * * *

[4] The breach of the attorney-client privilege, assuming, *arguendo*, that it did occur in this case has serious Fifth and Sixth Amendment implications. Some courts have held that the unauthorized disclosure of privileged information is a per se violation of the Sixth Amendment, calling for invalidation of a conviction or dismissal of an indictment. *See, e.g., United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978). Moreover, the deliberate violation of an attorney-client privilege by the attorney also serves to deny a defendant his Fifth Amendment right against self-incrimination. *See, generally*, 24 C. Wright and K. Graham, *Federal Practice and Procedure: Federal Rules of Evidence* §5472 (1986).